BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JONATHAN DIVI	)	
Claimant	)	
VS.	)	
	)	
MARTEN TRANSPORT LTD.	)	
Respondent	)	Docket No. 1,066,632
AND	)	
	)	
PRAETORIAN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) appealed the April 9, 2014, Preliminary Order entered by Administrative Law Judge (ALJ) Steven J. Howard. John G. O'Connor of Kansas City, Kansas, appeared for claimant. David F. Menghini of Kansas City, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 30, 2013, deposition of claimant and exhibit thereto;[1] the transcript of the October 8, 2013, preliminary hearing; the December 12, 2013, independent medical evaluation report of Dr. Thomas S. Samuelson; the transcript of the March 11, 2014, preliminary hearing and exhibits thereto; the transcript of the April 8, 2014, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

In his Application for Hearing, claimant asserted he sustained a left knee injury when opening a truck door on July 19, 2013. Respondent asserts compensability for claimant's injury should be denied because it had a policy requiring claimant to undergo post-injury drug testing and claimant refused to do so.

[1] Respondent marked as an exhibit an employee's injury report. It is unknown if the parties intended the exhibit to be part of the record. The exhibit had no bearing on the undersigned Board Member's findings.

Claimant asks the ALJ's April 9, 2014, Preliminary Order be affirmed.

The ALJ found, in part:

> 3. The Respondent contends that claimant has failed to comply with the employees manual regarding the taking of a drug screen within 24-hours after notification of an alleged occupational accident. The Administrative Law Judge notes that the Respondent according to the employee report of incident was notified, specifically Ann Konsela on July 30, 2013 approximately. There is no indication that any test was required of claimant on the date he notified Ms. Konsela.
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> The records indicate based upon the testimony of Vicki Huber that she discussed with claimant on August 5, 2013 the alleged occupational accident in which he complained. The record further indicates that on the date of that conversation August 5, 2013, claimant had been terminated.
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> 4. Accordingly, one would ask why undergo the drug screen after being terminated two weeks after the alleged accident? Accordingly, the fact claimant did not undergo the requested testing, subsequent to his termination with Respondent, is not fatal under the factual situation herein presented. Furthermore, Ms[.] Huber testified in all probability she would have denied the claim even if claimant had undergone the drug testing.[2]

The issue before the Board is: did claimant refuse to submit to a drug test allegedly requested by respondent and, therefore, is not entitled to compensation?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

The details of claimant's work accident and subsequent medical treatment will not be set forth herein, as they are irrelevant to the issue raised by respondent on appeal.

Claimant asserts he injured his left knee on July 19, 2013, when he opened the door of a semi-trailer. Following the accident, claimant did not immediately report the accident to respondent and continued working. Claimant indicated he did not immediately report his injury to respondent because, "I didn't think it was a big issue."[3] Claimant testified that his left knee initially swelled badly, but the swelling subsided. Then, about seven to eight days later, his left knee symptoms worsened. Claimant testified his health insurance did

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[2] ALJ Order at 2.

[3] Claimant Depo. at 37.

not start until August 5, 2013, and he wanted to wait until after then to seek medical treatment.

Claimant agreed that on August 1, 2013, he was discharged by respondent. He was in Pennsylvania and received a telephone call from someone named Ann. Ann told claimant he was being terminated and, in turn, he then informed Ann about his knee injury.

At his deposition, claimant acknowledged respondent asked him to take a drug test and he agreed to do so. Claimant thought that maybe someone named Vicki asked him to take a drug screen. Claimant indicated he did not undergo the requested drug test because he never received paperwork providing information about the drug test, such as location. Claimant indicated he did not know if respondent had picked a location for him to take the drug test.

At the March 11, 2014, preliminary hearing, claimant testified he did not report the accident until approximately 11 days later because, ". . . I thought it [left knee] was going to be okay and I wanted to keep my job. I really didn't think it was a big issue."[4] Claimant testified he was called by a lady in human resources 11 days after the accident and was told he was being discharged for violating a company policy of burning a tire. After being told he was terminated, claimant disclosed that he had an accident. Claimant was not questioned whether during the conversation he was asked to submit to a drug test.

At the same preliminary hearing, respondent introduced the affidavit of Annette Konsela, a human resources senior generalist for respondent. The affidavit indicated that on August 1, 2013, she called claimant and terminated him because he twice violated company policy. The affidavit also stated claimant jammed his knee two weeks before August 1, 2013, and he planned to seek medical treatment and had spoken to an attorney.

Vicki Huber, respondent's senior workers compensation claims representative, was the only witness who testified at the April 8, 2014, preliminary hearing. Ms. Huber testified that on August 5, 2013, claimant called respondent and was referred to her by the safety department because he was reporting a workers compensation claim. Claimant indicated he sustained a knee injury on July 19, when he opened a trailer door. Ms. Huber testified that during the conversation, she informed claimant he would have to take a drug test. She told claimant there were three places in Kansas City where claimant could undergo drug testing, and he indicated Concentra in Lenexa was closest. Ms. Huber indicated she provided claimant with the address and telephone number of Concentra and told him that he must take the drug test within 24 hours, but did not specify a time.

After her conversation with claimant, Ms. Huber prepared a letter dated August 5, 2013, to claimant verifying he filed a workers compensation claim and asking him to

[4] P.H. Trans. (Mar. 11, 2014) at 11.

complete and return three forms. The forms were a list of claimant's medical and chiropractic providers in the last 10 years, a consent for disclosure of health care information and an employee's injury report. Ms. Huber explained the August 5, 2013, letter did not mention a drug test because claimant was to undergo the drug test within 24 hours after she verbally notified him to do so. Ms. Huber indicated she had no fax number or email address for claimant. Ms. Huber indicated that on August 6, 2013, at 10:11 a.m., she faxed a non-DOT drug test sheet to Concentra. She testified that claimant completed and returned all three documents that were enclosed with the August 5 letter.

On cross-examination, Ms. Huber testified she memorialized her August 5 conversation with claimant. She indicated she entered notes about the conversation into her computer on August 12. Ms Huber acknowledged there was nothing in her notes indicating she told claimant to report for a drug test within 24 hours of the August 5 conversation. She also admitted that during the August 5 conversation, claimant never refused to take a drug test, but that he did want to talk to an attorney first. Ms. Huber confirmed that she did not tell claimant that if he spoke to an attorney first and did not take the drug test within 24 hours that his claim would be denied. She also acknowledged that even if claimant had taken the drug test and passed it, she likely would have denied his claim. Ms. Huber also agreed there was no probable cause for claimant to take a drug test.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-501(b) states in pertinent part:

> (1)(A) The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including, but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens.
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> (E) An employee's refusal to submit to a chemical test at the request of the employer shall result in the forfeiture of benefits under the workers compensation act if the employer had sufficient cause to suspect the use of alcohol or drugs by the claimant or if the employer's policy clearly authorizes post-injury testing.
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> (2) The results of a chemical test shall be admissible evidence to prove impairment if the employer establishes that the testing was done under any of the following circumstances:

(A) As a result of an employer mandated drug testing policy, in place in writing prior to the date of accident or injury, requiring any worker to submit to testing for drugs or alcohol;

(B) during an autopsy or in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and not at the direction of the employer;

(C) the worker, prior to the date and time of the accident or injury, gave written consent to the employer that the worker would voluntarily submit to a chemical test for drugs or alcohol following any accident or injury;

(D) the worker voluntarily agrees to submit to a chemical test for drugs or alcohol following any accident or injury; or

(E) as a result of federal or state law or a federal or state rule or regulation having the force and effect of law requiring a post-injury testing program and such required program was properly implemented at the time of testing.

(3) Notwithstanding subsection (b)(2), the results of a chemical test performed on a sample collected by an employer shall not be admissible evidence to prove impairment unless the following conditions are met:

(A) The test sample was collected within a reasonable time following the accident or injury;

(B) the collecting and labeling of the test sample was performed by or under the supervision of a licensed health care professional;

(C) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;

(D) the test was confirmed by gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample;

(E) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee; and

(F) a split sample sufficient for testing shall be retained and made available to the employee within 48 hours of a positive test.

Respondent's legal theory is simple: Ms. Huber requested claimant to submit to a drug test on August 5, 2013, but claimant deliberately failed to do so. Therefore, under K.S.A. 2013 Supp. 44-501(b)(1)(E), claimant is not entitled to compensation.

Ms. Konsela's affidavit does not indicate she requested claimant take a drug test, nor did she testify. Ms. Huber testified she told claimant during their August 5 telephone conversation to report to Concentra within 24 hours to submit to a drug test. Yet, she did not memorialize that in her notes. Her letter to claimant on August 5 makes no reference to a drug test. Furthermore, she did not fax the non-DOT drug test sheet to Concentra until the next day. Claimant testified he was told he would have to submit to a drug test, but was never provided information concerning the drug test. This Board Member finds there is insufficient evidence to prove claimant refused to submit to a drug test.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[6]

WHEREFORE, the undersigned Board Member affirms the April 9, 2014, Preliminary Order entered by ALJ Howard.

IT IS SO ORDERED.

Dated this ____ day of June, 2014.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

c: John G. O'Connor, Attorney for Claimant
jack_oconnor2000@yahoo.com

David F. Menghini, Attorney for Respondent and its Insurance Carrier
dmenghini@mvplaw.com; mvpkc@mvplaw.com; dscott@mvplaw.com

Daniel L. Doyle, Attorney for Respondent and its Insurance Carrier
d.doyle@swrllp.com; m.toplikar@swrllp.com

Honorable Steven J. Howard, Administrative Law Judge

[5] K.S.A. 2013 Supp. 44-534a.

[6] K.S.A. 2013 Supp. 44-555c(j).